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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

PETITIONER'S REPLY BRIEF

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13 pp

TABLE OF CITED AUTHORITIES

CASES: Page

Brannan Sand & Gravel Co.,
289 NLRB 977 (1988) *5*

Casale Industries, 311 NLRB 951 (1993) 6,7

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985) 9

Local Lodge No. 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) . . . . . *passim*

MFP Fire Protection, Inc. v. NLRB,
101 F.3d 1341 (10th Cir. 1996) 2,8

NLRB v. Metropolitan Life Ins. Co.,
380 U.S. 438 (1965) 10

NLRB v. Triple A Fire Protection, Inc.,
136 F.3d 727 (11th Cir. 1998),
cert. denied, 119 S.Ct. 795 (1999) 2,8

South Prairie Const. Co. v. Op. Eng.,
425 U.S. 800 (1976) 10

Triple C Maintenance, Inc.,
327 NLRB No. 15 (1998) 1-2

PETITIONER'S REPLY BRIEF

The briefs in opposition -- most probably out of a want of any colorable alternative -- seek to drown this case and the questions presented by our *certiorari* petition in a sea of obfuscation. But when all is said and done, the following is crystal clear:

- The situation here is a straightforward one. A construction industry employer who has many years before recognized a union as a NLRA § 9(a) exclusive bargaining representative, and has done so in an express unequivocal recognition agreement, refuses to bargain in good faith with that union as required by NLRA § 8(a)(5) and, when charged with that unfair labor practice, seeks to interpose the defense that the underlying § 9(a) recognition was invalid for want of a proper union showing of majority support at the time recognition was granted.

- The decision below, by recognizing that defense, can only encourage this employer tactic and the labor relations instability and complex NLRB and court litigation it entails.

- The NLRB, in a uniform line of cases construing NLRA § 10(b) and this Court's Local Lodge No. 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) decision, has ruled that such delayed counter-attacks on established collective bargaining relationships in the construction industry -- like delayed direct attacks on the relationship in *non*construction industries -- are time barred. E.g., Triple C. Maintenance, Inc., 327 NLRB No. 15

(1998)(citing cases).

- The Tenth Circuit and the Eleventh Circuit have both agreed with this Board rule. NLRB v. Triple A Fire Protection, Inc., 136 F.3d 727(11th Cir. 1998), cert. denied 119 S.Ct. 795 (1999); MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341 (10th Cir. 1996).

- In direct contrast, the Fourth Circuit rejected the NLRB's ruling that, seven years after the fact, the Employer here was barred by § 10(b) from challenging the validity of its 1987 NLRA § 9(a) recognition agreement and of the Union's status as a majority representative at that time:

> Recent decisions of the Board and of the Tenth and Eleventh Circuits to the contrary notwithstanding, we do not believe that Section 10(b) can reasonably be interpreted to prohibit [the Employer], the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective recognition that is the basis of the Board's Complaint. [Pet. App. 21a, n.6, emphasis in original].

It was our submission in the *certiorari* petition -- and it is our submission now -- that the paramount purpose of NLRA § 10(b) and this Court's Bryan Manufacturing decision is to bar delayed attacks upon continuing § 9(a) collective bargaining relationships in the construction industry as in all other industries; that the Board rule

endorsed by the Tenth and Eleventh Circuits is faithful to § 10(b) as interpreted in Bryan Manufacturing, while the Fourth Circuit's contrary position with regard to the Bryan Manufacturing rule is not; and that the Court should grant *certiorari* to remedy the sharp disagreement between the circuit courts on this important issue of NLRA law.

Nothing in the Employer's perfunctory opposition or the Board's elaborately convoluted opposition comes close to providing a reasoned response.

I. The Employer's four-page "[r]easons [f]or [d]enying [t]he [w]rit" is a set of a variations of a single theme. The Employer avers that "the dispute which Petitioner would now bring to the Court's docket is itself particularly fact-based," and that, "[e]ven if the Fourth Circuit incorrectly required unnecessary evidence from complaining unions, there is no reason for believing that the unions will not provide the required evidence of majority support..." Emp. Br. in Op. 15.

That is to both misstate the ruling below and to ignore the NLRA § 10(b) rule and its rationale. The Fourth Circuit, after extended discussion, rejected the position of the NLRB and the Eleventh and Tenth Circuits that, as a matter of law, § 10(b) precludes review of the validity of the Union's 1987 majority showing in the context of the Employer's subsequent 1994 refusal to bargain unfair labor practice case. Pet. App. 19a-21a, n.6. Moreover, the Employer's facile assurance that the Fourth Circuit's error in this regard is as nothing since "the required evidence," while many years old, is "easily" provided is an assurance Congress *rejected* in terms in enacting § 10(b). Congress's purpose was to preclude "litigation over past events 'after

records have been destroyed, witnesses have gone elsewhere, and recollections of the event have become dim and confused.'" Bryan Manufacturing, 362 U.S. at 419 (quoting H.R. Rep. No. 248, 80th Cong., 1st Sess., p.40).

II. While the Board labels its brief as one "in opposition" to the *certiorari* petition, that submission is, in truth, one that steadfastly refuses to treat, or take any position on, the questions presented in the petition. It is perhaps most to the point that the Board does not contest our showing (i) that the first question presented as we state it is an important and recurring NLRA question; (ii) that the Board's answer to that question endorsed by the Tenth and Eleventh Circuits is correct; or (iii) that the contrary answer we ascribe to the Fourth Circuit is wrong. Given Board counsels' deep knowledge and long experience, this silence can not be inadvertent. Thus, the fair inference -- albeit a negative one -- is that the Board recognizes that the first question we present *is* certworthy and that the Board has no cognizable reasons to offer the Court against reviewing and deciding that question now rather than to "await" another case and another day. NLRB Br. in Op. 12.

Against that background, and having the need to provide some explanation for not petitioning for *certiorari* itself, what Board counsel do argue is that the first question stated in the *certiorari* petition "is not presented by this case, because the court of appeals held that petitioner and American had a Section 8(f) agreement, not a Section 9(a) agreement," and because "the Board has recognized... that Section 10(b) does not preclude an inquiry into whether a union had an 8(f) relationship rather than a 9(a) relationship." NLRB Br. in Op. 9, 10. We readily concede that such a court of appeals holding, if made, would not

generate a certworthy question. But the Fourth Circuit's decision here rests on no such basis. And, Board counsel's attempt to make it appear otherwise conflates two legal doctrines the Board decisions are careful to keep separate and distinct.

The key to deciphering what the Board opposition brief works to confuse is that a construction industry employer can offer either one of two distinct responses to a charge that, on the expiration of a collective bargaining agreement, the employer refused to bargain in good faith with a union representative of his employees: First, that the union has an NLRA § 8(f) representative status -- viz. a status resting on a prehire recognition without a showing of majority employee support -- and that under the Board's *Deklewa* doctrine, the employer has no NLRA § 8(a)(5) obligation to bargain with the union. Second, that while the union claims to enjoy a § 9(a) representative status -- viz. a status that rests on a recognition based on majority employee support -- the union did not in fact have, or show, majority employee support at the time of its recognition as a § 9(a) representative and that its lack of majority at that earlier time invalidates its recognition and excuses the later employer refusal to bargain.

The first of these responses is sound as a matter of Board law and, since it goes to the union's *current* status at the time of the employer refusal to bargain, raises no § 10(b) timeliness questions whatsoever, as the Board decisions recognize. E.g., Brannan Sand & Gravel Co., 289 NLRB 977 (1988). The second response, in contrast, is, in all its operational respects, identical to the NLRA § 8(a)(2) charge attacking a long-past § 9(a) recognition that Bryan Manufacturing holds is time barred. And the Board law is

that, by a parity of reasoning, such an employer response to a § 8(a)(5) charge is time-barred as well. The Board spelled all this out in its leading Casale Industries, 311 NLRB 951 (1993) decision and did so with special attention to the dispositive difference between § 8(a)(5)/§ 8(f) refusal to bargain cases and § 8(a)(5) / § 9(a) cases:

> In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.
>
> These same principles would be applicable in the construction industry. In *Deklewa*, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in construction industries, who have established and maintained a stable Section 9 relationship, are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. 211 NLRB at 953.

And in distinguishing between § 9(a) and § 8(f) cases for §

10(b) purposes, the Board noted:

> Brannan Sand & Gravel Co., ... does not require a contrary result. There was no showing in that case that the parties intended a 9(a) relationship. Rather, the General Counsel argued, unsuccessfully, that the Board should presume that pre-1959 relationships were 9(a) relationships. By contrast, in the instant case, there is a showing that the parties intended a 9(a) relationship. [Id. at n.18].

There is no excuse for Board counsel to treat these two classes of cases as one for the purpose of the opposition brief here.

This case turned on the second employer response just outlined and only that response. The Employer sought to defend its refusal to bargain by attacking the validity of its earlier express § 9(a) recognition agreement. American Automatic Br. to the Fourth Circuit, 16. And, the Fourth Circuit sustained just that defense by permitting the Employer to defend its 1994 refusal to bargain in good faith "by challenging the validity of the evidence of effective recognition" of the Union in 1987. Pet. App. 21a., n.6.

The short of the matter is that, contrary to the Board's opposition brief, the Fourth Circuit *did* reach the issue on which petitioner seeks review -- whether "petitioner [was] entitled to invoke Section 10(b) against a challenge to its majority status at the time of voluntary [§ 9(a)] recognition" -- and the Fourth Circuit decided that issue contrary to the Board decisions endorsed by the Tenth and Eleventh

Circuits. *Compare* Bd. Br. in Op. 11. And, while Board counsel seek to portray this issue as one and the same with the issue of a union's § 8(f) status at the time of an employer's refusal to bargain, the two are conceptually distinct as the Board decisions demonstrate.

Board counsel's attempt to make the circuit conflict recognized by the Fourth Circuit itself disappear by referring to Triple A Fire Protection and MFP Fire Protection as cases, unlike this case, "[where] the courts of appeals upheld the Board's finding that the parties had attained a 9(a) bargaining relationship," Bd Br. in Op. 12, rests on their misstatement of the Fourth Circuit's decision just discussed and on their erroneous equation of a "§ 8(f) status" response to a refusal to bargain charge and an "invalid initial § 9(a) recognition" response to such a charge.

Indeed, at an earlier point the Board opposition brief highlights the conflict by summarizing Triple A Fire Protection as holding that "'after achieving full section 9(a) status,' the union was 'entitled to full membership in section 9(a) status, including the application of section 10(b), to bar employer's challenge to union's majority status at time of voluntary recognition.'" Bd. Br. in Op. 9-10. That holding is, of course, directly contrary to the Fourth Circuit's holding here. The later lawyerly quibbles at Bd. Br. in Op., pp. 12-14, do not begin to show otherwise. *See also* Supplemental NLRA Br. in Op. in Triple A Fire Protection, Inc. v. NLRB, No. 98-551, at p.2 ("The court [in American Automatic] rejected the Board's contention that consideration of ... evidence [of the union's majority status at the time of voluntary § 9(a) recognition] was barred by the six-month limitations period prescribed by Section 10(b) of the Act. 29 U.S.C. 10(b).")

III. Our *certiorari* petition presents a second, contingent question which would be reached only if the first question we present is answered in the negative, and which we acknowledge is not a certworthy question standing on its own -- "Whether the Fourth Circuit erred in determining for itself in the first instance that an NLRA § 9(a) recognition agreement is invalid on the ground that, in the Court of Appeal's judgment, the union's proffer to the employer showing majority support in 1987 was an inadequate showing in that regard." Pet. i.

The Board opposition brief's response on this question is an exquisite exercise in equivocation. In text, Board counsel essay a new art form -- the *post hoc* re-rationalization and defense of a court of appeals decision, adverse to the underlying Board decision, as one that is "not unwarranted" in its approach, as "not unreasonable" in its reading of selected Board decisions that Board counsel recognize are not authoritative, and, again, as "not unwarranted" in its ultimate legal conclusions. *See* Bd. Br. in Op. 14-17. We are far from clear as to the significance to be attached to the point that a free-wheeling court of appeals' exercise in NLRA lawmaking is "not unreasonable" or "not unwarranted." But what is clear *is* that none of this represents the *Board's* position on the merits, and none of it provides any basis for the conclusion that the court of appeals decision is correct.

Indeed, the only direct response to our showing in support of the second question presented is tucked away in the Board opposition brief's final footnote:

> Although [the] remand [petitioner argues is required] would have been preferable, see

> Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985), it would not have changed the outcome, because the court of appeals had concluded that, under [NLRA] law, the existence of the union security clause prevented petitioner from relying on union membership to make the requisite showing. [Bd. Br. in Op. 17-18, n.12.]

That response is wrong as a matter of administrative law and of labor law.

In the former regard, what this Court said in South Prairie Const. Co. v. Op. Eng., 425 U.S. 800, 805 (1976) (quoting NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1965)) is directly to the point: "[F]or [the appellate] court to take upon itself the initial determination of this [NLRA] issue was 'incompatible with the orderly function of the process of judicial review.'"

In the latter regard, the Fourth Circuit's ruling on the governing law is not dispositive because, as Board counsel recognize, "[r]ecent Board decisions support petitioner's contrary view that the validity of an employer recognition agreement instead turns on whether the union 'was, *in fact*, the chosen representative of a majority of the employees in an appropriate bargaining unit.' " Bd. Br. in Op. 14, quoting Pet. 23, emphasis in orginal.

CONCLUSION

For the reasons stated above, and in the petition, a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted

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